



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

July 29, 2003

Mr. J. Erik Nichols
Henslee, Fowler, Hepworth & Schwartz
3200 S.W. Freeway, Suite 2300
Houston, Texas 77027

OR2003-5180

Dear Mr. Nichols:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185031.

The Alief Independent School District (the "district"), which you represent, received a request for information relating to (1) TAAS scores for each school in the district from 1991 to the present; (2) vendor lists and payout for the district from 1995 to the present; (3) professional consultant lists and payout for the district from 1995 to the present; (4) evaluations for each principal in the district from 1991 to the present; (5) a named individual's application for employment, resume, appointment to position, and employment file; and (6) board minutes, tapes, and agendas at the time the named individual was selected as superintendent of schools. You inform us that the requestor has withdrawn part 4 of the request. You also inform us that the district no longer has a copy of the employment application sought in part 5 of the request. We note that chapter 552 of the Government Code does not require the district to release information that did not exist when it received this request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). You claim that other information that is responsive to part 5 of this request is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.¹ We assume that the district has released any other information that is responsive to this request for information, to the extent that the district held or had access to such information when

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. *See Gov't Code* § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

it received this request. If not, then the district must do so at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000).

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). In this instance, the submitted information includes a completed evaluation made of, for, or by the district. The district must release the completed evaluation under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 or expressly confidential under other law. The submitted information also includes a contract relating to the expenditure of public or other funds by the district. The contract must be released under section 552.022(a)(3) unless it is expressly confidential under other law. You claim that the evaluation and the contract are excepted from disclosure under section 552.103 of the Government Code. We note, however, that section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception may be waived). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold the evaluation or the contract under section 552.103.

With regard to the submitted information that is not subject to section 552.022, we address your claim under section 552.103. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You state that the present request for information was prompted by pending litigation between the district and a named individual whom the district terminated. You state that the individual's termination is being reviewed by the state commissioner of education under docket number 047-LH-1202. We note, however, that you have not explained how or why the proceedings before the commissioner of education qualify as litigation for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision Nos. 588 (1991), 368 (1983); 301 (1982). Furthermore, you have not informed us of the issues in the proceedings before the commissioner or demonstrated how or why the information that is not subject to section 552.022 relates to the issues in those proceedings. *See* Gov't Code § 552.103(a); Open Records Decision No. 551 at 5 (1990) (governmental body must reasonably establish that subject matter of information at issue is related to litigation). We therefore conclude that you have not demonstrated that section 552.103 is applicable to the submitted information that is not subject to section 552.022. Therefore, the district may not withhold any of that information under section 552.103.

Next, we address your claim under section 552.101 of the Government Code with regard to the evaluation that is subject to section 552.022(a)(1). Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. You contend that the evaluation is confidential under section 21.355 of the Education Code. Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). In that decision, we determined that the word

“teacher,” for purposes of section 21.355, is a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* Open Records Decision No. 643 at 4. We also concluded that the word “administrator” in section 21.355 means a person who is required to and does in fact hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You indicate that the submitted evaluation, which we have marked, relates to an administrator of the district. You do not inform us, however, whether the evaluation relates to an individual who holds an administrator’s certificate under subchapter B of chapter 21 of the Education Code and was performing the functions of an administrator at the time of the evaluation. Assuming, however, that the administrator in question satisfies both of those criteria, we conclude that the evaluation is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. *See* Open Records Decision No. 643 at 4. If the individual to whom the evaluation pertains did not qualify as an administrator under section 21.355 at the time of the evaluation, then the district may not withhold the evaluation under section 552.101.

You also claim that some of the submitted information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from public disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” This exception is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). We note that the test of employee privacy under section 552.102(a) is the same as the test of common-law privacy under section 552.101 of the Government Code. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.). Therefore, we will address your privacy claim under section 552.101. Common-law privacy under section 552.101 protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a

drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

Common-law privacy also protects certain types of personal financial information. In prior decisions, this office has determined that financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 545 at 4 (1990), 523 at 4 (1989), 373 at 4 (1983). Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992) (TexFlex benefits), 545 at 3-5 (1990) (deferred compensation plan). Likewise, an employee's designation of a retirement beneficiary is excepted from disclosure under the common-law right to privacy. *See* Open Records Decision No. 600 at 9 (1992). However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state, and the basic facts about that transaction are not protected by common-law privacy. *Id.* at 9.

You contend that portions of the submitted information are protected by common-law privacy. We note, however, that the information in question relates mostly to the qualifications, official conduct, and compensation of a public employee. As this office has often noted, such information is a matter of legitimate public interest. *See* Open Records Decision Nos. 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest), 470 at 4 (1987) (public employee's job performance does not generally constitute his or her private affairs). We conclude that a small amount of the submitted information is protected by common-law privacy. The district must withhold that information, which we have marked, under section 552.101. None of the remaining information is excepted from disclosure under section 552.101 in conjunction with common-law privacy.

You also raise section 552.102(b), which excepts from disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee." Section 552.102(b) further provides, however, that "the degree obtained or the curriculum on a transcript in the personnel file of the employee" are not excepted from disclosure. We have marked a submitted transcript that the district must withhold under section 552.102(b), except for the information that reveals the degree obtained and the courses taken.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who timely requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time that the request for the information is received by the governmental body. *See* Open Records

Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the district received this request for information. The district may not withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who did not make a timely election to keep the information confidential. You inform us that the individual to whom the submitted documents pertain timely requested that his section 552.117(a)(1) information be kept confidential. You state that the document submitted as Exhibit B reflects the individual's election under section 552.024. We note, however, that the document in question does not appear to constitute or contain an election under section 552.024. Nevertheless, if the individual to whom the submitted information pertains timely and specifically elected under section 552.024 to keep his section 552.117 information confidential, then the district must withhold the types of information that we have marked under section 552.117(a)(1). If the individual in question did not timely elect to keep his section 552.117 information confidential, then the district may not withhold any of the marked information under section 552.117(a)(1).

We note that this individual's social security number may also be excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number in question is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the district to obtain or maintain a social security number. Thus, we have no basis for concluding that this social security number was obtained or is maintained pursuant to such a law and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, the district should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

Lastly, we address the Texas driver's license information that is contained in the submitted documents. Section 552.130 of the Government Code excepts from disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.] Gov't Code § 552.130(a)(1). The Texas driver's license information that we have marked is excepted from disclosure under section 552.130.

In summary, the district must withhold the evaluation under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code if the individual to whom it pertains qualified as an administrator under section 21.355 at the time of the evaluation. The district also must withhold the information that is excepted from disclosure under section 552.101 in conjunction with common-law privacy. The district must withhold the information in the transcript under section 552.102(b), except for the information that

reveals the degree obtained and the courses taken. The section 552.117(a)(1) information is excepted from disclosure if the individual to whom the information pertains timely elected under section 552.024 to keep the information confidential. The individual's social security number may be excepted from disclosure under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. The Texas driver's license information is excepted from disclosure under section 552.130. The district must release the rest of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

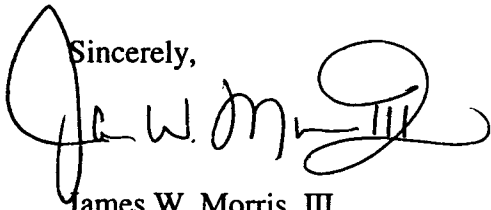
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris, III". The signature is fluid and cursive, with a large initial "J" and a stylized "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 185031

Enc: Submitted documents

c: Mr. Anthony P. Griffin
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Galveston, Texas 77550
(w/o enclosures)